IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

JUDGMENT
IN
**1. S.B. Civil Second Appeal No.101/1988**

Birbal S/o Shri Haribux
(since deceased) through his L.Rs.
Smt. Triveni Devi & Others
...plaintiff-appellants
Versus
Smt. Gyarsi Widow of Lekhuram
(since deceased) through her L.Rs.
Narsingh & Others
AND
State of Rajasthan through Collector, Sikar
...defendant-respondents

**2. S.B. Civil Cross Objection**
**(Registered at S.No.8443 Dt.1.9.1988)**
In
S.B. Civil Second Appeal No.101/1988

**Date of Judgment ::: 11th October, 2006**

PRESENT
**Hon'ble Mr. Justice Narendra Kumar Jain**

Shri Girraj Bardar,
Shri Ashok Singh Shekhawat,
Shri Mohan Choudhary, Advocates, for the appellants
Shri N.L. Pareek, Advocate, with
Shri Pawan Pareek, Counsel for the respondents
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**//REPORTABLE//**

**By the Court**:-

Brief facts giving rise to this second appeal are that plaintiff-appellant Birbal filed a suit for declaration and permanent injunction in the lower court against the defendants to pass a decree in his

favour declaring him to be the successor of late Shri Nathu Ram son of Geeda Ram and that the defendants no.1 to 4 are not the heirs of deceased Nathu Ram and further that deceased Nathu Ram did not die issueless. It was further prayed in the plaint that the land, which has been attached by Tehsildar, Tehsil Neem-ka-Thana, treating the land of late Shri Nathu Ram as escheat property, be released and the same be handed over to the plaintiff. A prayer of permanent injunction was also made that the defendants no.1 to 5 be restrained from interfering with the possession of the plaintiff and further not to transfer the land in dispute. The plaintiff pleaded in the suit that late Shri Nathu Ram son of Geeda Ram was an old person and was issueless but he was very affectionate to the plaintiff, therefore, he used to live with the plaintiff. Shri Nathu Ram in his lifetime executed a 'Will' dated 11.7.1981 in favour of the plaintiff. Shri Nathu Ram died on 9.5.1982 and, by virtue of execution of the 'Will' in his favour, the plaintiff became the owner of the property left by late Shri Nathu Ram. However, the Tehsildar without any authority, attached the property left by Shri Nathu Ram treating it to be escheat property as Nathu Ram died issueless.

The defendants no.1 to 4 filed joint written statement in the lower court wherein they denied the contents of the plaint. It was pleaded that Nathu Ram died issueless. The defendant no.1 Mst. Gyarsi Devi was cousin sister of late Nathu Ram, therefore she is successor of late Nathu Ram. The execution of 'Will' dated 11.7.1981 was denied and it was pleaded that the same is forged one, therefore, it was prayed that the suit of the plaintiff be dismissed. Defendant no.5 the State of Rajasthan also filed separate written statement wherein the contents of the plaint were denied and it was pleaded that the 'Will' appears to be forged one. However, it was also pleaded that the person, who is declared successor by the Court, will be entitled to get the property left by late Nathu Ram.

The learned lower court framed eight issues. The issue no.1 was as to whether late Nathu Ram executed a 'Will' dated 11.7.1981 in favour of plaintiff Birbal. Both the parties led oral as well as documentary evidence in support of their respective contentions. The learned lower court vide its judgment and decree dated 16.12.1987 decreed the suit of the plaintiff and it was declared that Nathu Ram son of Geeda Ram had executed a 'Will' dated 11.7.1981

(Exhibit-1) in favour of the plaintiff and on that basis the plaintiff is entitled to be his successor and Tehsildar was directed to release the attached property of late Nathu Ram and to handover the possession of the same to the plaintiff. The decree of permanent injunction was also passed in favour of the plaintiff thereby restraining the defendants from interfering with the possession of the plaintiff.

The defendants no.1 to 4 filed Civil First Appeal, which was allowed by the lower appellate court vide judgment and decree dated 30.7.1988. The judgment and decree passed by the lower court was set aside. The lower appellate court further held that the defendant no.1 Mst. Gyarsi was also not declared as successor of late Nathu Ram as she did not file any counter-claim in respect of her claim to declare her as legal heir of late Nathu Ram, after payment of court fee and in these circumstances no decree can be passed in her favour also and consequently he directed that the entire property left by late Nathu Ram be treated as escheat property and the Tehsildar was directed to take appropriate action in respect of the said property in accordance with the provisions of the Rajasthan Escheat Property Regulation Act.

The plaintiff being aggrieved with the

aforesaid judgment and decree passed by the lower appellate court, preferred this second appeal.

This court, while admitting the present second appeal on 12.8.1988, formulated following substantial questions of law:-

> "1. Whether the judgment of reversal of finding of fact arrived at by the trial court without giving reasons to disbelieve the reasonings of the trial court is perverse?
>
> 2. Whether apart from the evidence of scribe and the attesting witnesses of the will it is incumbent for the propounder of the will to examine the expert?"

It is also relevant to mention that the defendants no.1 to 4 also filed their cross-objections under Order 41 Rule 22 of the CPC in respect of observations given in Para 24 of the judgment of the lower appellate court to the effect that Mst. Gyarsi did not file any counter-claim to declare that she is entitled to recover the property of late Nathu Ram, therefore, the property left by Nathu Ram is declared as escheat property. The said cross-objections have not been admitted so far by this court and the same are lying in the file of this second appeal, therefore, they were also heard along with the second

appeal itself.

Learned counsel for the appellant contended that the reasonings given by the lower appellate court in reversing the finding of the lower court are absolutely illegal and unjustified. He contended that the reasonings given by the lower appellate court for dismissing the suit of the plaintiff are contrary to the well settled principles of law by this court as well as by Hon'ble the Apex Court. He further contended that the lower court recorded a finding on issue no.1 in favour of the plaintiff and came to the conclusion that the 'Will' (Exhibit-1) was executed by late Nathu Ram in favour of plaintiff Birbal and the same is proved not only by scribe but by attesting witnesses also. He further contended that the lower appellate court has not disbelieved the testimony of scribe as well as the attesting witnesses but rather recorded a finding that, on the basis of the evidence, the execution of 'Will' (Exhibit-1) is proved but he, at his own, came to a conclusion that there are suspicious circumstances which make the execution of the 'Will' doubtful, and, on the basis of suspicious circumstances narrated by him in the judgment, disbelieved execution of the 'Will' (Exhibit-1) and consequently set aside the judgment and decree passed

by the lower court, which is absolutely illegal and without jurisdiction and, the same is liable to be set aside by this Court.

Learned counsel for the respondents supported the judgment of the lower appellate court and contended that the reasons given by the lower appellate court for treating the 'Will' (Exhibit-1) as suspicious are correct and the lower appellate court was right in setting aside the judgment and decree passed by the lower court and in dismissing the suit of the plaintiff. The learned counsel for respondents has not advanced any specific arguments on the cross-objection.

I have considered the submissions of the learned counsel for both the parties and minutely scanned the impugned judgment passed by the lower appellate court as well as the record of both the courts below.

The first question formulated by this court was whether the judgment of the lower appellate court of reversal of finding of the fact arrived at by the trial court without giving reasons to disbelieve the reasonings of the trial court is perverse? and second question was whether apart from the evidence of scribe and the attesting witnesses of the 'Will' it is

incumbent for the propounder of the 'Will' to examine the expert? Exhibit-1, the 'Will', is the disputed 'Will' alleged to have been executed on 11.7.1981 by late Nathu Ram Sharma Son of Shri Girdhari Lal @ Geeda Ram, Resident of Village Chala, District Sikar, in favour of plaintiff Birbal. This 'Will' (Exhibit-1) bears the thumb impression of deceased Nathu Ram, and the name of scribe is Ganpat Lal, who wrote this 'Will'. It is on the record that scribe Ganpat Lal could not be examined as he had died. There are four attesting witnesses of the 'Will' (Exhibit-1), namely, Ram Narain, Kajod, Jagdish and Banwari Lal Jat. Out of four attesting witnesses, Banwari Lal, Jagdish and Kajod were examined as PW-2, PW-3 and PW-6, respectively. Apart from above three attesting witnesses, PW-4 Jugal Kishore, who brought the stamps, on which 'Will' was written, was also examined. All the three attesting witnesses have proved the execution of 'Will' by testator Nathu Ram. They have come in witness-box and have proved the thumb impression of Nathu Ram. Nothing has come on the record from the cross-examination of these three witnesses giving any suspicious circumstances for not executing the 'Will' by testator Nathu Ram. The learned lower court while deciding issue no.1 came to

the conclusion that execution of 'Will' Exhibit-1 by testator in favour of plaintiff Birbal is fully proved and after considering the other issues also, the lower court passed a decree in favour of the plaintiff. The lower appellate court did not record any reason for not agreeing with the finding of the lower court for proving the 'Will' Exhibit-1, but came to a conclusion that execution of 'Will' cannot be believed as there are some suspicious circumstances. The lower appellate court recorded the following suspicious circumstances for not believing the 'Will' Exhibit-1:-

> 1. The 'gotra' of Nathu Ram, the testator, and plaintiff Birbal was different;
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> 2. Mst. Gyarsi, the defendant no.1, was his cousin sister, therefore, there was no question of execution of the 'Will' in favour of plaintiff Birbal;
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> 3. When the 'Will' was executed in favour of plaintiff Birbal then he did not disclose the same soon after the death of Nathu Ram particularly when his statement was recorded by Tehsildar on 16.5.1982;
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> 4. The plaintiff did not examine any expert to prove the signature/thumb-impression of Nathu Ram, the testator;
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> 5. The purchase of stamps on 27.6.1981 is also doubtful.

It appears that the suspicious circumstances narrated by the learned lower appellate court to create doubt on execution of the 'Will' Exhibit-1 are absolutely illegal and the judgment and decree of the learned lower appellate court is liable to be set aside. So far as execution of 'Will' is concerned, it is a settled law that 'Will' can be oral even and it is not necessary that execution of 'Will' should be disclosed to a person in whose favour it is executed. It is also not necessary that the 'Will' should be executed on stamps. It is also not necessary that the 'Will' should be executed only in favour of the legal heirs/representatives or it should not be executed in favour of other persons. The 'gotra' of a person in whose favour the 'Will' is executed is also irrelevant. PW-3 Jagdish is an important witness in the present case, in whose possession the 'Will' was lying. PW-3 Jagdish has stated that Nathu Ram was known to him. He was living with Birbal. Deceased Nathu Ram was happy with Birbal. Nathu Ram used to tell him that after his death the entire property will be of Birbal. PW-3 was neighbour of deceased Nathu. Nathu Ram put his thumb-impression on the 'Will' Exhibit-1 in presence of PW-3 Jagdish. PW-3 Jagdish

has further stated that Ganpat was scribe, who wrote this 'Will' at the instance of Nathu Ram in favour of Birbal. Ganpat also put his signatures on the 'Will' Exhibit-1. PW-3 Jagdish further stated that the 'Will' Exhibit-1, after its execution, was initially kept by Nathu Ram himself but after 5 to 10 days he handed over the stamps/'Will' to him and gave instructions to him that he should keep this 'Will' with him and it should be given to Birbal only after his death. PW-3 has further stated that Nathu Ram also instructed him that in case the 'Will' is given to him then he will not serve him properly. PW-3 has also proved the signatures of other witnesses, namely, Banwari, Kajod and Ram Narain, on the 'Will' Exhibit-1. The lower court has considered all the statements of witnesses of both the parties and recorded a finding that the 'Will' Exhibit-1 was executed by Nathu Ram in favour of plaintiff Birbal. The lower appellate court has not given any cogent reasons for not believing the reasons given by the lower court for recording the finding in respect of issue no.1 in favour of the plaintiff or in proving the 'Will' Exhibit-1, but the lower appellate court recorded its own finding and narrated the suspicious circumstances as mentioned above and on that basis created doubt on execution of the 'Will'

Exhibit-1 and consequently held that the 'Will' was not executed. It appears that the aforesaid suspicious circumstances as mentioned by the lower appellate court in its judgment are absolutely illegal and not tenable in the eye of law also.

In Gangadas Vs. Moolchand & another - 1974 WLN (UC) 225, this Court considered the controversy relating to execution of 'Will' itself and held that execution of the 'Will' not disclosed to avoid displeasure of brother during lifetime of executor, then nothing is unusual when a resident of Jodhpur executed the 'Will' at Gwalior.

In Panchulal Vs. Ganeshilal Maheshwari - 1973 RLW 182, this Court considered the provisions of Section 73 of the Evidence Act and held that it cannot be laid down as a general rule that wherever a defendant chooses to deny his signatures, the plaintiff must examine a handwriting expert to prove his case nor is the court bound to accept the evidence of a handwriting expert produced by the defendant as true. The court has to apply its own mind to the evidence of the expert and it is open to it either to believe it or to disbelieve it.

In Uma Devi Nambiar Vs. T.C. Sidhan - (2004) 2 SCC 321, the Hon'ble Supreme Court held that although

the propounder of the 'Will' has to remove all suspicious circumstances, but mere exclusion of natural heirs, or reduction of their share, would not by itself amount to a suspicious circumstance, especially when the bequest is in favour of an offspring.

In Ramabai Padmakar Patil Vs. Rukminibai Vishnu Vekhande & Others - AIR 2003 SC 3109, the Hon'ble Supreme Court, after considering the provisions of Section 63 of the Succession Act, particularly in respect of execution of 'Will' and its genuineness, held that testator mother gave entire property to widowed daughter who lost her husband at very early age, exclusion of all other daughters would not, in facts and circumstances, cast doubt as to authenticity of 'Will'.

In Modilal Vs. Kanhiyalal - 1966 RLW 197, this Court held that one of the attesting witness failing to say in evidence that he saw the testator sign, the attestation is proper when other evidence is sufficient to show that he must have seen him sign the 'Will'.

In Kedarnath Vs. Sitaram - 1960 RLW 328, this Court held that having regard to the requirements of a valid attestation, all that is necessary, as matter of

law, is that the attesting witnesses should have put their signatures on the document to be attested and if they have done so, their attestation cannot be rendered invalid if they have not used any specific words to indicate that they are signing as attesting witnesses.

The above discussed facts as well as proposition of law make it clear that the 'Will' Exhibit-1 dated 11.7.1981 executed by Nathu Ram in favour of plaintiff Birbal was fully proved by the statements of PW-2 Banwari Lal, PW-3 Jagdish, PW-4 Jugal Kishore and PW-6 Kajod, and the learned lower court was right in deciding the issue no.1 in favour of the plaintiff. The reasonings given by the lower court have not been reversed by the lower appellate court also but the finding of the lower court was reversed by the lower appellate court on the basis of certain suspicious circumstances as mentioned in the judgment, which are absolutely not tenable in the eye of law, in view of the above referred judgments of this court as well as the Hon'ble Supreme Court. Even if plaintiff Birbal was not the family member of Nathu Ram then also this cannot be a ground for not executing the 'Will' Exhibit-1 in his favour by Nathu Ram. If Smt. Gyarsi was excluded from the 'Will' by

Nathu Ram, then that itself is not a ground for disbelieving the 'Will' Exhibit-1. When the 'Will' has been proved by the attesting witnesses as referred above, then it was not necessary for the plaintiff to examine any further handwriting-expert to prove the 'Will' Exhibit-1. It is also not necessary that the execution of the 'Will' ought to have been in knowledge of plaintiff Birbal in whose favour it was executed by Nathu Ram. Rather it shows his bona-fide that the 'Will' Exhibit-1 was executed without disclosing this fact to him and it was kept by Nathu Ram with Jagdish PW-3, who was not present on the date of death of Nathu Ram and had gone outside the village and when he came back on 16.5.1985 he disclosed the execution of the 'Will' by Nathu Ram in favour of plaintiff Birbal. PW-3 Jagdish has also explained as to why the 'Will' was kept by Nathu Ram with him. PW-3 has stated that Nathu Ram had instructed him that he should not disclose the execution of the 'Will' during his lifetime to Birbal otherwise he will not serve him properly and the 'Will' should be given to Birbal only after his death. The explanation for keeping the 'Will' with Jagdish appears to be justified. The circumstance relating to purchase of stamps and execution of the 'Will' on the stamps are not so much

relevant as the 'Will' can be executed even on simple paper, and even no stamps are required for execution of the 'Will'.

In these circumstances I find that the suspicious circumstances narrated by the lower appellate court for discarding the execution of the 'Will' Exhibit-1 are illegal and the same are liable to be set aside.

The question no.1 formulated by this court is decided by holding that the lower appellate court has committed an illegality in reversing the finding of the lower court without giving any reasons to disbelieve the reasons of the trial court and by giving his own reasonings relating to suspicious circumstances and in these circumstances the judgment and decree passed by the lower appellate court is perverse and the same is liable to be set-aside. The question no.2 formulated by this court is also decided that when the 'Will' Exhibit-1 was proved by attesting witnesses, namely, Banwari (PW-2), Jagdish (PW-3) and Kajod (PW-6), then the burden to prove the execution of the 'Will' Exhibit-1 had already been discharged by the plaintiff and it was not necessary for the plaintiff to examine the expert evidence and the lower appellate court has committed a serious illegality in

saying that expert evidence should have been examined by the plaintiff to prove the signatures of the testator on the 'Will' Exhibit-1.

Consequently, the second appeal is allowed. The judgment and decree passed by the lower appellate court is set aside and the judgment and decree passed by the lower court is restored.

The entire judgment and decree passed by the lower appellate court itself has been set aside, therefore, there is no need to decide the cross-objections filed by the respondents separately and the same are also dismissed.

The cost is made easy.

**(Narendra Kumar Jain) J.**

//Jaiman//